Supreme Court, U.S.
FILED
SEP 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-89

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GOLDEN PACIFIC BANCORP.,

Petitioner,

vs.

ROBERT L. CLARKE, *et al.*,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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8 pp

TABLE OF CONTENTS

	Page
Introduction	1
Argument	2
Conclusion	5

TABLE OF AUTHORITIES

CASES: Page

Berkovitz by Berkovitz v. *United States* 108 S. Ct. 1954 (1988) 1-5

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INTRODUCTION

Petitioner Golden Pacific Bancorp. respectfully submits this supplemental brief to urge that the decision below be vacated and remanded to the Court of Appeals for the District of Columbia Circuit for further consideration in light of this Court's opinion in *Berkovitz by Berkovitz* v. *United States*, 108 S. Ct. 1954 (1988). The *Berkovitz* decision was rendered in June, 1988, near the end of the Court's October 1987 Term, and petitioner was unaware of that decision when the petition for a writ of certiorari was filed. Pursuant to Rule 22.6 of this Court's rules, a supplemental brief such as this one may be filed at any time while the case is pending on petition for a writ of certiorari.

ARGUMENT

In our original petition for a writ of certiorari, we explained that the correctness of the judgment of the Court of Appeals turned upon its application of the "discretionary function" exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a). Here, the particular act that the petitioner challenged in its district court complaint was the decision of the Comptroller of the Currency to declare the Golden Pacific National Bank insolvent and thereafter to appoint a receiver to take over possession of the Bank's assets and operation of its business. The complaint alleged that the Bank was not in fact insolvent, and that the Comptroller's decision had been made in bad faith.

The Court of Appeals affirmed the dismissal of the complaint without reaching the merits, holding instead that the Comptroller's declaration that the Golden Pacific National Bank was insolvent was a "discretionary function" that fell outside of the FTCA's waiver of sovereign immunity.

Regrettably, when the Court of Appeals issued its decision, it did not have the benefit of this Court's holding in the *Berkovitz* case, *supra*. Evidently responding to the confusion among the lower courts to which we alluded in our petition for certiorari, the Court in *Berkovitz* undertook to clarify the scope of the "discretionary function" exception to FTCA liability. At issue in that case was the decision of the National Institutes of Health's Division of Biologic Standards to license a polio vaccine. Allegedly, the DBS licensed the vaccine without having received required safety data. The district court in that case, like the district court in the instant case, had held that the discretionary function exception to the FTCA did not apply, and that the suit therefore could be maintained. The Court of Appeals, however, again like the Court of Appeals in this case, disagreed, and held that the action was barred under 28 U.S.C. § 2680(a).

This Court granted certiorari, and held that the discretionary function exception did not apply. Much of the discussion in the Court's opinion in *Berkovitz* applies with equal force in this case. Specifically, the Court took pains to reject the Government's

argument that "the exception precludes liability for any and all acts asrising out of the regulatory programs of federal agencies." 108 S. Ct. at 1959-60. Rather, the *Berkovitz* Court held that regulatory conduct is not discretionary unless "it involves an element of judgment or choice." 108 S. Ct. at 1958. Therefore, the exception does not apply "when a federal statute, regulation, or policy specfically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect." 108 S. Ct. at 1958-59. Put otherwise, the "discretionary function" exception "protects only governmental actions and decisions based on considerations of public policy." 108 S. Ct. at 1959.

These principles, taken directly from the Court's subsequent decision in the *Berkovitz* case, are incompatible with the analysis of the Court of Appeals in the instant case. Here, the Court of Appeals focused on the broad authority of the Comptroller of the Currency to ensure that national banks "follow safe and sound banking policies." (Pet. 7a). The Court never focused on the facts that, under *Berkovitz*, are critical: whether the Golden Pacific National Bank was insolvent, and whether the Comptroller's declaration of insolvency was made in bad faith. If, as the complaint alleged, the Bank was not actually insolvent,[1] and if the Comptroller's declaration was made in bad faith, then the "discretionary function" exception as this Court recently reinterpreted it in *Berkovitz* is not a bar to tort liability.

It is significant, in this regard, that the Comptroller is required by statute to make "due examination" of the affairs of a national bank, and to be satisfied that the bank is in fact insolvent, before

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[1] Even today, we have received documentary evidence in the form of an FDIC balance sheet showing that the Bank's assets remain some $9 million dollars in excess of its liabilities. Likewise, the complaint squarely alleged that the Comptroller's conduct "was in direct violation of the applicable federal banking statutes and regulations." (¶ 33).

he may appoint a receiver to close up the bank. Insolvency is not a matter of "judgment or choice." Neither is the Comptroller's obligation to make "due examination" of the bank's affairs. Here, the complaint alleged, in substance, that the Golden Pacific National Bank was not insolvent and that the Comptroller did not make "due examination" of the bank's affairs. Under these circumstances, the closure of the bank should not have been insulated from damage liability. Put otherwise, the closure of a solvent bank is not a matter that is the "product of judgment or choice" by the Comptroller of the Currency, 108 S. Ct. at 1959, and such an unlawful act is not exempted from liability under the FTCA under this Court's holding in the *Berkovitz* case.

Because this Court has now clarified the meaning of the "discretionary function" exception in the *Berkovitz* case, and because it has eliminated the legal gap to which we made reference in our petition for a writ of certiorari, it is not essential to grant plenary review in this case. Rather, the Court should pursue the course that it typically takes when a decision of a court of appeals has been called into question by a subsequent decison by this Court. That is, it should grant the writ of certiorari, summarily vacate the judgment of the court below, and remand the case to the court of appeals for further consideration in light of the supervening authority. This, we submit, would be the appropriate disposition in this case.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court of appeals vacated and remanded for further consideration in light of *Berkovitz*, *supra*.

Respectfully submitted,

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